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COMPUGATES DEVELOPMENT AND MINING SDN BHD v. MAIN UPTOWN SDN BHD

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL SUIT NO: BA-22NCvC-425-09-2019]
20 AUGUST 2022

B

Abstract – *The joint venture agreement ('JVA'), having spelt out the contractual rights and obligations of parties, must be complied with and any breach thereof would render the JVA null and void. The developer's breach of the terms of the JVA disentitled the developer to the compensation sum awarded by the Land Administrator for the compulsory acquisition of the land and the party entitled to the compensation would be the registered proprietor of the land.*

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CONTRACT: *Agreement – Joint venture agreement – Land to be developed subjected to compulsory acquisition – Party entitled to compensation sum – Whether developer or registered proprietor of land – Whether developer breached terms of agreement – Whether agreement rendered null and void – Whether developer has any interest in land – Whether developer contractually entitled to sum compensation sum – Whether land owner, as registered and beneficial owner of land, entitled to entire compensation sum*

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WORDS & PHRASES: *'in such event' and 'in any other event whatsoever' – Phrases in terms of joint venture agreement – Construction of terms – Whether ambiguity resolved pursuant to contra proferentem rule*

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The dispute between the plaintiff and the defendant was in respect to their contractual rights and obligations under joint venture agreement ('JVA') dated 18 August 2015 as regards to the development of a large piece of land, owned by the plaintiff and the compensation sum awarded for the compulsory acquisition of the land. Pursuant to the terms of the JVA, the plaintiff granted the defendant an exclusive right and authority to develop a commercial development scheme on the land ('project'). The JVA was subject to and conditional on the fulfilment of the condition precedent set out in s. 4.01 of the JVA, amongst others, for the defendant to obtain the development order for the development of the project. Pursuant to s. 4.02 of the JVA, the defendant warranted and undertook to apply for the development order not later than six months from the date of the JVA and if failed to do so, pursuant to para 1.3 of the Second Schedule of the JVA, the plaintiff may forfeit the sum of RM3 million of the first payment paid by the defendant as the agreed liquidated damages. However, when an area of 0.9892 hectare of the land ('scheduled land') was subsequently gazetted for

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the purposes of acquisition under the Land Acquisition Act 1960 and the Land Administrator ('LA') awarded a sum of RM9,297.400 as compensation for the acquisition of the scheduled land, both the plaintiff and the defendant claimed that they were entitled to the compensation sum. The plaintiff commenced an action for, among others, a declaration that the plaintiff was entitled to the compensation sum and that the monies be released with interest. The issues arose for the court's consideration were, *inter alia*: (i) whether the defendant had submitted the application for the development order within six months from the date of the JVA; (ii) whether the plaintiff could forfeit the sum of RM3 million from the first payment of the initial payment; (iii) the party entitled to the compensation sum; and (iv) whether the JVA was termination and/or became null and void. The defendant's case was that it had applied for the development order within six months from the date of the JVA pursuant to its letter dated 7 January 2016 to Majlis Daerah Sepang ('MDS'), the local planning authority empowered to grant the development order for the project.

Held (allowing plaintiff's application):

(1) No one can carry out a development unless they have been granted a planning permission by the local planning authority under the Town and Country Planning Act 1976. Mr Winston Ng, who had signed the letter for the defendant, was not a 'qualified person' under the TCPA to make the application since he was neither a registered town planner nor a registered architect. The defendant's 7 January 2016 letter to MDS was not an application for the development order of the project on the land. Instead, it was an application by the defendant to MDS for road access. The first application for a development order for the project was made through Carisplan Consultant's letter of 17 October 2018 on behalf of the defendant. The defendant had thus failed to apply for the development order within six months from the date of the JVA and had accordingly, breached the terms of the JVA and its warranty and the undertaking to the plaintiff in s. 4.02(a) of the JVA. The JVA was accordingly, terminated and was null and void pursuant to s. 4.04 of the JVA. (paras 29, 49, 50, 53, 56, 57 & 97)

(2) The defendant had expressly agreed in the JVA that RM3 million of the first payment of the initial payment should be forfeited by the plaintiff as agreed liquidated damages in the event the defendant failed, refused or neglected to submit the application for the development order. As the defendant had failed to apply for the development order within six months from the date of the JVA, it followed that pursuant to the terms in para 1.3 of the Second Schedule of the JVA, the plaintiff may forfeit the sum of RM 3 million of the RM5 million paid by the defendant as the first payment. (paras 58 & 59)

(3) The defendant did not purchase the land from the plaintiff, nor did it have an option to purchase the land. It also did not have an equitable interest in the land acquired under trust. Hence, the defendant was not able to prove that it was the person interested to the compensation sum awarded for the scheduled land. Section 8.02(b) of the JVA expressly stated that the defendant was absolutely entitled to the compensation sum 'subject to the settlement of the Owner's Entitlement'. The defendant had not settled any of the owner's entitlement to the plaintiff and therefore, was not contractually entitled to the compensation sum pursuant to the terms in s. 8.02(b) of the JVA. The plaintiff, as the registered owner of the land as at the date of the award by the LA, was thus the person entitled to the compensation sum awarded for the scheduled land. (paras 72, 81, 88, 89 & 93)

(4) The phrases 'in such event' and 'in any other event whatsoever' in s. 4.04 of the JVA clearly meant that the parties had expressly agreed that the defendant shall not be entitled to any reimbursement or compensation whatsoever for any costs and expenses that the defendant had paid, incurred or suffered in connection with the JVA, the project and the approvals applied for. If there is any ambiguity in the wordings of the section, pursuant to the *contra proferentem* rule, it was to be interpreted against the defendant as the party that had drafted the JVA. The defendant was therefore not entitled to any compensation or reimbursement for the costs that it had incurred and the losses suffered. The defendant was also not entitled to payment from the plaintiff a sum equivalent to the increase in value of the land. (paras 109-113)

Case(s) referred to:

Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***

Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***

Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd [2017] 8 CLJ 392 FC ***(refd)***

Sistem Penyuraian Trafik KL Barat Sdn Bhd v. Kenny Heights Development Sdn Bhd & Anor [2009] 4 CLJ 57 CA ***(refd)***

Union Workshop (Construction) Co v. Ng Chew Ho Construction Co Sdn Bhd [1977] 1 LNS 149 FC ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 2, 4, 8, 10
National Land Code, s. 417
Town and Country Planning Act 1976, ss. 2, 19(1), 21C, 22(3), 24(3), 58(2)(h)

For the plaintiff - Dhyana Shila Vasanthan & Syamala Jeyaraman; M/s Dhyan & Co
For the defendant - Choon Hou Leng & Loo Hui En; M/s Raja Darryl & Loh

Reported by S Barathi

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This writ action between the plaintiff and the defendant arose from a joint venture agreement dated 18 August 2015 between them ("JVA") for the development of large piece of land in Cybersouth owned by the plaintiff, and the subsequent compulsory acquisition of part of the land.

[2] The dispute between the parties is in respect to their contractual rights and obligations under the JVA as regards the development of land and the project, and the entitlement to the compensation sum awarded by the land administrator for the compulsory acquisition of the scheduled land (all defined below).

[3] At the conclusion of the trial of this action, this court found that the defendant had failed to submit the application for the development order within six months from the date of the JVA. The court further found that one or more of the conditions precedents of the JVA were not fulfilled within two years of the submission of the application for the development order for the project, and that the JVA was accordingly terminated and null and void pursuant to the terms of the JVA.

[4] As regards the compensation sum awarded by the Land Administrator for the scheduled land, this court found that the plaintiff is the party entitled to the Compensation sum.

[5] The full reasons for this court's findings and decision are set out in this judgment.

The Facts

[6] The land owned by the plaintiff is held under 99-year leasehold title: H.S.(D): 13828, PT 26800, Mukim Dengkil, Daerah Sepang, Negeri Selangor, expiring on 21 May 2103, measuring in area approximately 154,990 square metres (38.30 acres) (the "land"). The plaintiff is the registered proprietor and beneficial owner of the land.

[7] The plaintiff is a private limited company and is a wholly-owned subsidiary of the Compugates Holdings Berhad, a public listed company listed on the Bursa Malaysia.

[8] The defendant is a private limited company carrying out the business of developing and constructing development projects. It holds itself out as having "the technical expertise, knowledge and experience in carrying out and completing development projects": see recital of the JVA.

[9] Desirous to unlock the economic potential of the land, the plaintiff entered into the JVA with the defendant for the commercial development of the project on the land.

JVA For The Development Of The Land

[10] Pursuant to the terms of the JVA, the plaintiff granted the defendant the exclusive right and authority to develop a commercial development scheme on the land (defined as "project" in the JVA) and the defendant undertook to carry out and successfully complete the project. It was agreed that the defendant will construct the project on the land in seven phases. Additionally, the plaintiff appointed the defendant and each of the defendant's directors or authorised officers, as its lawful attorney pursuant to a power of attorney dated 19 August 2015 (the "POA"), with full powers to do all and any of the acts in respect of the land, including:

> (i) To make and submit applications and plans for the purpose of obtaining or securing any planning permission (kebenaran merancang), building plan approval or any other licences, approvals, permits or exemptions in connection with or incidental to or arising from or necessary or advisable for the project ...

[11] The defendant was also granted the liberty under s. 3.03(b)(iii) of the JVA to enter a private caveat on the land upon execution of the JVA. Pursuant to this contractual right, on 22 October 2015, the defendant entered a private caveat presentation no. 54272/2015 on the land.

[12] The JVA is subject to and conditional on the fulfilment of the conditions precedents set out in s. 4.01 of the JVA, namely, the defendant obtaining the following approvals and consent for the project:

(i) all the subdivision approval for the subdivision of the land into subdivided individual lots;

(ii) the layout plan approval for the layout plan;

(iii) the building plans approval or where the project is developed in phases, the first building plans approval for the last phase;

(iv) the development order ("DO") for the development of the project;

(v) the consent in writing from the relevant authorities, or the owner/occupier of the neighbouring land, to the access road that provides ingress and egress to and from the land; and

(vi) all such other consents, permits and approvals of the appropriate authorities as hereafter become necessary for the carrying out of the project.

[13] Pursuant to s. 4.02 of the JVA, the defendant warranted and undertook in that it will apply for the development order for the project not later than six months from the date of the JVA.

[14] The defendant agreed in para. 1.3 of the Second Schedule of the JVA that that if it failed to submit the application necessary for obtaining the development order in accordance with the terms of the JVA, the plaintiff may forfeit the sum of RM3 million of the first payment (as defined in the JVA) paid by the defendant to the plaintiff as agreed liquidated damages.

[15] The JVA is also subject to and conditional upon the conditions in s. 4.03 of the JVA. Pursuant to these conditions, the plaintiff and the defendant had to obtain, within 30 days from the date of the JVA, the requisite approval of its board of directors and shareholders; and within one year from the date of the JVA, the plaintiff and its parent company had to comply with all written laws and Bursa Malaysia's Main Market Listing Requirements.

[16] Section 4.04 of the JVA provides that if, due to no fault of either party, (a) one or more of the conditions precedent in s. 4.01 is not fulfilled within two years from the date of the submission of the application of the DO or the six months extension of time which the plaintiff agrees to grant to the defendant upon request; or (b) if any of the conditions in s. 4.03 are not fulfilled within the time stipulated therein, then upon demand by the defendant the plaintiff is to return to the defendant the initial payment, free of interest, that had been paid by the defendant to the plaintiff. Section 4.04 states that once the initial payment had been returned, the JVA will terminate and becomes null and void and be of no further force or effect, and neither party shall have any claims whatsoever against the other. Also, that the defendant is to withdraw all caveats lodged on the land for or on behalf of the defendant.

[17] In brief, the fiscal terms agreed by the parties under the JVA are as follows:

(i) the plaintiff grants the defendant the exclusive right to develop the project on the land;

(ii) the defendant constructs and develop the project at its own costs and expense;

(iii) the defendant pays the plaintiff on the execution of the JVA the sum of RM5 million (defined in the JVA as the "first payment") and another sum of RM5 million within two months from the date of the first building plan approval of the first phase of the project (defined in the JVA as the "second payment"). The first payment and the second payment is defined in the JVA as the "initial payment";

(iv) the initial payment of RM10 million will be refunded by the plaintiff to the defendant within 14 days of the defendant's demand after the issuance of the final completion certificate for the last phase of the

project (*ie*, the seventh phase) by the architect. Provided that if the defendant did not submit the application necessary for the development order in accordance with the terms of JVA or it did not commence the construction work of the first phase of the project upon obtaining the building plan approval, the plaintiff shall forfeit RM3 million of the first payment as agreed liquidated damages; and

(v) the plaintiff's total entitlement of the project (defined as "owner's entitlement" in the JVA) under is RM220 million or 22 per cent (%) of the total gross development value ("GDV") of all seven phases of the project, whichever is higher. Paragraph 2 of the Second Schedule of the JVA states:

"2. Owner's Entitlement

2.1 The Company shall pay the Owner such entitlements within such periods of time as set out in the Table below: -

(1) Periods	(2) Owner's Entitlements
Within the **1st and 2nd years** of the 1st BP Approval Date **[First (1st) Phase]**	**RM10,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the First (1st) Phase, whichever is higher
Within the **3rd and 4th years** of the 1st BP Approval Date **[Second (2nd) Phase]**	**RM20,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Second (2nd) Phase, whichever is higher
Within the **5th and 6th years** of the 1st BP Approval Date **[Third (3rd) & Fourth (4th) Phases]**	**RM35,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Third (3rd) & Fourth (4th) Phases, whichever is higher
Within the **7th and 8th years** of the 1st BP Approval Date **[Fifth (5th) & Sixth (6th) Phases]**	**RM65,000,000.00** only or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Fifth (5th) & Sixth (6th) Phases, whichever is higher
Within the **9th and 10th years** of the 1st BP Approval Date **[Seventh (7th) Phase]**	**RM90,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Seventh (7th) Phase, whichever is higher

Compulsory Acquisition Of The Scheduled Land

[18] The proposed acquisition of an area totalling 0.9892 hectare of the land ("scheduled land") was gazetted for the purposes of acquisition under the Land Acquisition Act 1960 ("LAA 1960") for the Project Lebuhraya Kuala Lumpur-Putrajaya-KLIA (MEX 2) Tambahan ("the MEX 2 Highway") in the Selangor Government *Gazette* under s. 8 of the LAA 1960 on 12 April 2018. The proposal for the land acquisition through Form D of the LAA 1960 was registered on the land through Perserahan No. 4134/2018 on 6 June 2018. The notice of inquiry under s. 10 of the LAA 1960 was issued on 18 May 2018, whereby the date of the inquiry before the Land Administrator for the hearing of claims for compensation of interests on the scheduled land was fixed on 12 June 2018.

[19] The inquiry before the Land Administrator was attended by representatives of the plaintiff and the defendant. At the conclusion of the inquiry, the Land Administrator awarded the sum of RM9,397,400 ("Compensation sum") as compensation for the acquisition of the scheduled land. The Land Administrator also awarded the plaintiff the sum of RM750,014.25 for costs of announcement to the Bursa Malaysia, consultation fee and early entry cost as the owner of the land; and the defendant the sum of RM300,000 as cost for planning permission as a caveator of the land.

[20] Both the plaintiff and the defendant claim that they are entitled to the compensation sum. On the application of the Land Administrator in Originating Summons No. BA-24NCVC-1363-11-2018 ("OS 1383"), the Shah Alam High Court on 19 December 2018 ordered that the compensation sum of RM9,397,400 be deposited in the High Court under the name of "Akauntan Negara Malaysia" until further orders because of the competing claims to competition sum by the plaintiff as the landowner and the defendant as the caveator.

[21] On 26 March 2019, the plaintiff commenced an action at the Shah Alam High Court through Originating Summons No. BA-24NCVC-396-03-2019 ("OS 396"), for among others, a declaration that the plaintiff is entitled to the compensation sum and that the said monies be released with interest. On 26 September 2019, the Shah Alam High Court in OS 396 ordered that all proceedings in that action be converted to a writ action.

Analysis And Findings Of Court

Did The Defendant Apply For The Development Order Within Six Months From The Date Of The JVA?

[22] The main dispute in this suit is whether the defendant had submitted the application for the development order within six months from the date of the JVA. The plaintiff's case is that the defendant had failed to make the application for the development order within the six-months period from the date of the JVA.

[23] Whereas the defendant's case is that it did apply for the development order within six months from the date of the JVA. The defendant contends that its letter dated 7 January 2016 to Majlis Daerah Sepang (the "7 January 2016 letter") is the application for the development order under s. 4.02(a) of the JVA.

[24] The term "development order" in s. 4.02(a) is defined in s. 2.01 of the JVA as "planning permission" (kebenaran merancang) granted by the appropriate authorities for the development of the project. "Development order" and "appropriate authorities" is defined in s. 2.01 of the JVA as follows:

> Development Order: means the Planning Permission ('Kebenaran Merancang') granted by the Appropriate Authorities necessary for the development of the project (or any part thereof) and includes any amendments, variations and or modifications thereto at any time and or from time to time as approved by the Appropriate Authorities.
>
> Appropriate Authorities: means all Federal, State and Local governmental, statutory, semi-or *quasi*-governmental and or other authorities and or bodies having jurisdiction at any time and or from time to time over the project or any part(s) thereof and or any matter(s) related thereto and or whose licence, approval, consent, permit and or co-operation may be required and or necessary for the carrying out and successful completion of the project.

[25] Section 19 of the Town and Country Planning Act 1976 ("TCPA 1976") states that no person shall commence, undertake or carry out any development unless planning permission in respect of the development has been granted to him under s. 22 or extended under sub-s. 24(3) of the Act. Section 19(1) of the TCPA 1976 states as follows:

> 19. Prohibition of development without planning permission
>
> (1) No person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted to him under section 22 or extended under subsection 24(3).

[26] "Planning permission" is defined in s. 2 of the TCPA 1976 as "permission granted, with or without condition, to carry out development".

[27] Section 22(3) of the TCPA 1976 states as follows:

> (3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

[28] "Local planning authority" is defined in s. 2 of the TCPA 1976 as follows:

> in relation to an area, shall be construed as provided in s. 5 and, in relation to any land or building, means the local planning authority, as so construed, for the area in which the land or building is situated.

[29] Accordingly, no one can carry out a development unless they have been granted a planning permission by the local planning authority under the TCPA 1976.

[30] Hence, as regards the project, no development work can commence on the land without a development order. The parties agreed in the JVA that the defendant will apply for the development order within six months from the date of the JVA. As stated above, the defendant warranted and undertook in the JVA that it will submit the application for the development order within six months and it agreed that if it failed to apply for the development order within the six months (or any extension provided by the plaintiff under the JVA), the plaintiff is entitled to forfeit as agreed liquidated damages the sum of RM3 million out of the first payment.

[31] The question for this court's determination is whether the defendant's 7 January 2016 letter amounts to an application for a development order for the development of the project on the land.

[32] The 7 January letter (exhibited in bundle B2/p. 430) from the defendant to Majlis Daerah Sepang is reproduced below:

> Main Uptown Sdn Bhd
> Co. No. 1146841-V
> No. 26, Jalan Balakong Jaya 6, Taman Industri Balakong Jaya, 43300, Kajang, Selangor
>
> Our ref: MU/WIN/008/16
> Date: 7th Januari 2016
>
> Jabatan Perancang Bandar
> Majlis Daerah Sepang
> Persiaran Semarak Api, Cyber 1,
> 63200 Cyberjaya,
> Selangor Darul Ehsan
>
> Up: Pn. Rozeta Binti Md. Yusuf
>
> PER: Cadangan Pembangunan Komersil Di Atas Lot 30729, Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan
>
> PERMOHONAN JALAN MASUK LOT 30729
>
> Dengan segala hormat kami merujuk kepada perkara di atas.
>
> 1. Untuk makluman pihak tuan, kami ialah pemaju kepada plot tanah Lot 30729, ingin membuat permohonan untuk mendapatkan akses jalan kekal kepada plot pembangunan yang dinyatakan di atas.

2. Melalui surat ini, kami kemukan draf perancangan pelan susunatur tanah yang menjelaskan cadangan kedudukan jalan masuk untuk plot yang dinyatakan. Sila rujuk pelan susunatur untuk penjelasan.

Segala perhatian dan tindakan pihak tuan di dalam meluluskan permohonan kami adalah sangat-sangat kami hargai.

Sekian.

Terima kasih.

tt

...
Winston T.S.Ng

[33] Section 21C of the TCPA 1976 states that all plans, particulars, layout plans and other documents required to be submitted under the Act must be prepared either by (a) a person who qualifications are prescribed under para. 58(2)(h) of the TCPA 1976, or (b) a person who is entitled to do so under any written law.

[34] In this instant action, it is not disputed that Majlis Daerah Sepang (later known as Majlis Perbandaran Sepang) is the local planning authority empowered to grant the development order for the project and that it falls within the definition of an appropriate authority under the JVA. It is also not disputed that the application for planning permission for development of land located in Selangor is governed by the Kaedah-Kaedah Pengawalan Perancangan (AM) Selangor) 2001.

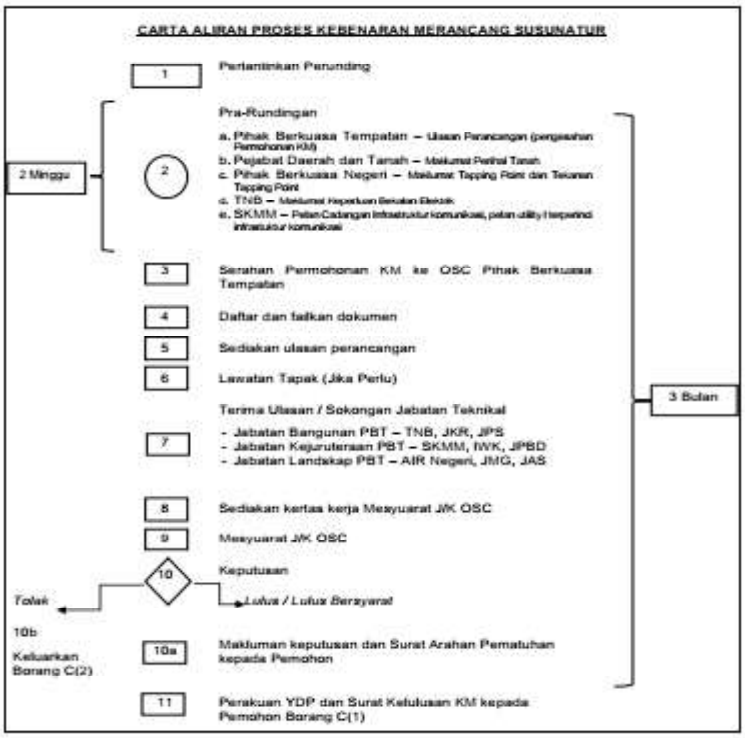
[35] The plaintiff's expert witness during the trial was Puan Khairiah @ Khatibah binti Mohd Talha ("PW3"), a registered town planner under the Town Planners Act 1995. She has more than 39 years' experience as an urban planner and has held leadership positions in various professional organisations, including as the President of the Malaysian Institute of Planners from 1999 to 2003 and the Secretary General of the Eastern Regional Organisation for Planning and Human Settlements (EOROPH) from 2002 to 2010.

[36] PW3 said that pursuant to the Majlis Perbandaran Sepang's Unit Pusat Setempat (One Stop Center) ("OSC") pre-consultation procedure, a qualified person, after preparing all the plans for the proposed development and before submitting the application for the planning permission officially to the local planning authority, is required to consult with all the relevant agencies on the proposed development. The qualified person will have to show and discuss the plans/drawings with all the agencies and to obtain the comments and the requirements of each agency. She said that the pre-consultation procedure was introduced by the local planning authority to ensure that all the plans have been comprehensively prepared and have taken into account all the technical requirements of the relevant authorities. It is also to reduce the time required to process applications for planning permissions.

[37] PW3 said that a submission for planning permission to Majlis Perbandaran Sepang must be made in the Borang OSC 1(a), a copy of which is exhibited in Tab C of her expert report annexed to her affidavit affirmed on 21 August 2020.

[38] From the Borang OSC 1(a), it is clear that the relevant agencies with whom the qualified person must discuss the proposed plans, under the pre-consultation procedure, prior to submitting the application for the planning permission, are Jabatan Kerja Raya Negeri Selangor (JKR), Jabatan Pengairan dan Saliran Negeri Selangor (JPS), Indah Water Konsortium (IWK), Jabatan Alam Sekitar Negeri Selangor (JAS), Tenaga Nasional Berhad (TNB), SYABAS KL dan SYABAS Daerah Sepang (SYABAS), Jabatan Mineral dan Geosains Negeri Selangor (JMG), Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM), Multimedia Development Berhad (MDec), Lembaga Perumahan dan Hartanah Negeri Selangor (LPHS), Lembaga Urus Air Selangor (LUAS).

[39] The flow chart for the application process for a planning permission is exhibited in Tab C of PW3's expert report. It is reproduced below:


CARTA ALIRAN PROSES KEBENARAN MERANCANG SUSUNATUR
1
Pertanyaan Perunding
Pra-Rundingan
a. Pihak Berkuasa Tempatan – Ulasan Perancangan (pengesahan Permohonan KM)
b. Pejabat Daerah dan Tanah – Maklumat Perihal Tanah
c. Pihak Berkuasa Negeri – Maklumat Tapping Point dan Telorian Tapping Point
d. TNB – Maklumat Kapasiti Bekalan Elektrik
e. SKMM – Pelan Cadangan Infrastruktur komunikasi, pelan utility berkaitan infrastruktur komunikasi
2 Minggu
2
3
Serahan Permohonan KM ke OSC Pihak Berkuasa Tempatan
4
Daftar dan tatkan dokumen
5
Sediakan ulasan perancangan
6
Lawatan Tapak (Jika Perlu)
Terima Ulasan / Sokongan Jabatan Teknikal
7
- Jabatan Bangunan PBT – TNB, JKR, JPS
- Jabatan Kejuruteraan PBT – SKMM, IWK, JPBD
- Jabatan Landskap PBT – AIR Negeri, JMG, JAS
3 Bulan
8
Sediakan kertas kerja Mesyuarat JK OSC
9
Mesyuarat JK OSC
10
Keputusan
Tolak
Lulus / Lulus Bersyarat
10b
Keluarkan Borang C(2)
10a
Makluman keputusan dan Surat Arahan Pematuhan kepada Pemohon
11
Perakuan YDP dan Surat Kelulusan KM kepada Pemohon Borang C(1)

[40] The Borang OSC 1(a) at p. 39 shows that the form must be checked and signed off by (i) Jabatan Perancangan Bandar, Majlis Perbandaran Sepang, and (ii) Unit OSC, Majlis Perbandaran Sepang.

[41] PW3 concluded that the defendant did not submit the application for the development order to the appropriate authority within six months from the date of the JVA. She said that the submission for the planning permission was made through a letter dated 17 October 2018 by Messrs Carisplan Consultants ("17 October 2018 letter"), on behalf of the defendant, which letter was received by the Majlis Perbandaran Sepang on 8 November 2018 (in bundle C2/p. 478). The contents of 17 October 2018 are reproduced below:

Carisplan Consultant

Ruj. Kami: CARIS/KOBAY/030046/16-02 (KM)
Tarikh: 17 October 2018

KETUA,

UNIT PUSAT SETEMPAT (OSC)
Majlis Perbandaran Sepang
Persiaran Semarak Api, Cyber 1
63200, Selangor Darul Ehsan

Tuan/Puan,

PERMOHONAN KEBENARAN MERANCANG PENDIRIAN BANGUNAN KAWASAN KOMERSIAL YANG MENGANDUNGI:

...

DI ATAS PT 26800 (LOT 307729), CYBERSOUTH, MUKIM DENGKIL, DAERAH SEPANG, SELANGOR DARUL EHSAN UNTUK TETUAN: MAIN UPTOWN SDN BHD

Per: Permohonan Kebenaran Merancang

Dengan segala hormatnya, merujuk kepada perkara di atas.

3. Bersama-sama ini kami kemukakan dokumen-dokumen berikut untuk semakan dana sokongan pihak tuan selanjutnya:

Semakan Unit Pusat Setempat (OSC)

2.1	Surat Permohonan Rasmi Pemohon	1 salinan
2.2	Borang A	1 salinan
2.3	Borang Kiraan Bayaran Fi	1 salinan
2.4	Laporan Cadangan Pemajuan	1 salinan
2.5	Pelan Susunatur (Saiz A3)	1 salinan
2.6	Pelan Susunatur (Saiz A1)	1 salinan
2.7	Pelan Ukur	1 salinan
2.8	Pelan Akui	1 salinan
2.9	Resit Cukai Tanah Terkini	1 salinan

2.10	Resit Cukai Taksiran Terkini	1 salinan
2.11	Geran/Hakmilik	1 salinan
2.12	Carian Rasmi Terkini	1 salinan

4. Kerjasama dan pertimbangan pihak tuan dalam memberikan sokongan ke atas cadangan pembangunan ini amat kami hargai.

Sekian terima kasih.

Yang benar,

CARISPLAN CONSULTANTS (SA 00529278-H)

Jurukur Bandar Bertauliah CK DEVELOPMENT CONSULTANTS

tt.

TPr. CHONG CHEE KIT Jururancang Bandar/Principal
No Pendaftaran: A 0249

[42] Encik Nazaros bin Baharam ("DW4"), a town planner from Carisplan Consultants was called by the defendant as one of its witnesses during the trial. DW4 testified that he was personally involved in assisting the defendant in its application for the development order/planning permission.

[43] DW4 said that he first saw the JVA in early 2017. DW4 said that pre-consultation is the first process that they had to do before they can submit the application for the development order. He said that Carisplan first applied for a pre-consultation for the application of the development order through their letter dated 6 May 2017 to the Majlis Perbandaran Sepang. The subject line of the said letter read "Per: Permohonan Kebenaran Merancang Menerusi OSC 3.0-Pra-Rundingan".

[44] According to DW4, Carisplan had submitted the 6 May 2017 letter to Majlis Perbandaran Sepang on 8 May 2017 but there were problems with the letter and the Majlis returned the letter on the spot.

[45] DW4 said that Carisplan then submitted the pre-consultation letter again on 24 July 2017 ("24 July 2017 letter"). He said that the 24 July 2017 letter was accepted by Majlis Perbandaran Sepang and is the official application letter for the pre-consultation prior to the submission of the application for the development order for the project.

[46] Majlis Perbandaran Sepang replied the 24 July 2017 letter in their letter dated 6 October 2017 to Carisplan ("6 October 2017 letter"), where the Majlis listed out the "ulasan perancangan" that Carisplan had to comply with before the application can be put before the OSC for further action. Carisplan was given three months to amend the pelan susun atur before it must be resubmitted to the Majlis for checking. The contents of the Majlis Perbandaran Sepang's 6 October 2017 letter is reproduced below:

Ulasan Perancangan

Saya dengan segala hormatnya merujuk kepada perkara di atas.

1. Adalah dimaklumkan bahawa setelah semakan dibuat, berikut adalah ulas perancangan yang perlu pihak tuan ikuti dan patuhi:

...

2. Pihak tuan diberi tempoh selama tiga (3) bulan daripada tarikh perbincangan untuk meminda pelan susun atur sebelum ianya dikemukakan semula kepada pihak Majlis untuk semakan. Pengesahan semakan akan dikeluarkan sebelum permohonan dapat dikemukan kepada Unit Pusat Setempat (OSC) Majlis untuk tindakan selanjutnya.

3. Kegagalan pihak tuan untuk mematuhi perkara di atas akan menyebabkan ulasan perancangan yang telah dikeluarkan terbatal dan perlu dikemukakan untuk perbincangan secara pra-rundingan semula.

Sekian, terima kasih.

(TPr ROZETA BINTI Md YUSUF) A.I.S

Pengarah

Jabatan Perancangan Bandar

b.p. Yang DiPertua

[47] DW4 testified that, after complying with the requirements of the Majlis Perbandaran Sepang's ulasan perancangan, the first submission for the planning permission/development order for the project is the 17 October 2018 letter (the contents of which is reproduced in para. [41] of this judgment), which was received by Majlis Perbandaran Sepang on 9 November 2018.

[48] The fact that the first submission for the planning permission for the project was made in 17 October 2018 letter was confirmed by the Majlis Perbandaran Sepang. In their letter dated 12 June 2020 to the plaintiff (exhibit in bundle B2 at pp. 176 to 177) ("12 June 2020 letter"), the Majlis confirmed that it had received an application for planning permission from the defendant on 9 November 2018. Paragraphs 2 and 3 of Majlis Perbandaran Sepang's 12 June 2020 letter is reproduced below:

2. Untuk makluman tuan, pihak Jabatan telah menerima permohonan kebenaran merancang untuk Tetuan Main Uptown Sdn Bhd pada 9 November 2018. Permohonan telah diproses dan mendapat kelulusan bersyarat di dalam Mesyuarat Setempat (OSC) Bil. 22/2018 bertarikh 4 Disember 2018.

3. Walau bagaimanapun projek tersebut tidak dapat diperakukan kerana belum memperolehi kesemua ulasan teknikal daripada jabatan/agensi teknikal yang berkaitan.

Sekian, terima kasih. A

(TPr. ROZETA BINTI Md. YUSUF) A.I.S

Pengarah

Jabatan Perancangan Bandar

b.p. Yang Dipertua B

Majlis Perbandaran Sepang

Findings Of Court

[49] This court finds that the 7 January 2016 letter from the defendant to Majlis Daerah Sepang was not an application for the development order of the project on the land. It was not even a submission for a pre-consultation C prior to the submission of a development order. The reasons for this finding are as below.

[50] It is clear from the natural and ordinary reading of the words in the 7 January 2016 letter, the letter is an application by the defendant to Majlis D Daerah Sepang for road access (akses jalan kekal) to the land. It is not an application for a development order. It would be a strain on the Bahasa Malaysia language and the English language for this court to interpret the words "Permohonan Jalan Masuk Lot 30729 in the subject line of the letter and the words "permohonan untuk mendapatkan akses jalan kekal kepada E plot pembangunan" in the body of the letter, to mean an application for a planning permission or development order;

[51] Both the plaintiff's expert witness (PW3) and the defendant's own witness (DW4) testified that an application for a development order can be made only by a qualified person. Their testimonies are in accordance with F provisions of the TCPA 1976.

[52] PW3 had testified that the application for the planning permission must be made by a "qualified person", namely a registered town planner or an architect under the Architects Act 1967. But DW4 said that in Selangor only a registered town planner can apply for a development order. G

[53] Notwithstanding the conflicting testimonies of PW3 and DW4 as to whether a registered town planner and an architect or whether only a registered town planner can apply for a development order in Selangor, what is clear is that Mr Winston Ng of the defendant who had signed the 7 January 2016 letter to Majlis Daerah Sepang, is not a "qualified person" under the H TCPA 1976 to make the application since he is neither a registered town planner nor a registered architect;

[54] DW4 testified that the 24 July 2017 letter from Carisplan to Majlis Perbandaran Sepang was the defendant's first submission for a pre-consultation, and that the defendant's first application for the development I order for the project was made through the 17 October 2018 letter submitted by Carisplan to Majlis Perbandaran Sepang; and

[55] Additionally, Majlis Perbandaran Sepang in their 12 June 2020 letter had confirmed in writing that the first application for a development order for the project was received by them on 9 November 2018.

[56] Therefore, based on the natural and ordinary meaning of the 7 January 2016 letter, the provisions of the TCPA 1976, the testimonies of PW3 and DW4, and the written confirmation by Majlis Perbandaran Sepang, this court finds the first application for a development order for the project was made through Carisplan's 17 October 2018 letter and not the defendant's 7 January 2016 letter.

[57] For this reason, this court finds that the defendant had failed to apply for the development order within six months from the date of the JVA. Accordingly, the defendant had breached the terms of the JVA and it had breached its warranty and undertaking to the plaintiff in s. 4.02(a) of the JVA.

Can The Plaintiff Forfeit The Sum Of RM3 Million From The First Payment Of The Initial Payment?

[58] As discussed above, the defendant had expressly agreed in para. 1.3 of the Second Schedule of the JVA that RM3 million of the first payment of the initial payment, shall be forfeited by the plaintiff as agreed liquidated damages in the event the defendant fails, refuses or neglects to submit the application for the development order in accordance with the provisions of the JVA. The provisions of the JVA require the defendant to submit the application for the development order within six months of the date of the JVA or by an extended period of not less than two months granted by the plaintiff on the defendant's application. It is not disputed that the defendant did not apply for an extension of the six-month period to submit the development order. Its pleaded case is that it had applied for the development order within the six months period through the 7 January 2016 letter.

[59] For the reasons discussed above, this court has found that the defendant had failed to apply for the development order within six months from the date of the JVA. Hence, it follows that pursuant to the terms in para. 1.3 of the Second Schedule of the JVA, the plaintiff may forfeit the sum of RM3 million of the RM5 million that was paid by the defendant as first payment.

Who Is Entitled To Compensation Sum For The Compulsory Acquisition Of The Scheduled Land?

[60] The plaintiff's pleaded case is that the defendant does not have any interest in the land or in the Compensation sum because (a) the defendant's rights at law and beneficially had not accrued under the JVA; and (b) s. 8.02(b) of the JVA expressly states that the defendant is only entitled to the compensation sum after the defendant has paid the plaintiff the owner's

entitlement under the JVA. The plaintiff pleaded that as the registered and the beneficial owner of the land, it is the person entitled to the entire compensation sum awarded for the acquisition of the scheduled land.

[61] Whereas the defendant contends that the plaintiff does not have any rights over the compensation sum at all. Learned counsel for the defendant submits that s. 8.02(b) of the JVA provides that in the event of a land acquisition, the defendant shall subject to the settlement of the owner's entitlement, is absolutely entitled to the benefit of any arrangement made or the compensation awarded by the acquiring authority in respect of the acquired land.

[62] Under s. 8.02 of the JVA, in the event there is a notice or declaration under ss. 4 or 8 of the LAA 1960 of an intended acquisition of the whole or part of the land, the plaintiff as the owner of the land is required to give the defendant a written notice of the acquisition notice or declaration, and the defendant shall be entitled by notice in writing either:

(i) to rescind the JVA – whereupon the defendant has to withdraw its caveats on the land and deliver vacant possession of the land to the plaintiff. Thereafter, the JVA will be terminated and null and void; or

(ii) to require the plaintiff as the owner of the land to serve notice upon the acquiring authority within 14 days from the defendant's election of the defendant's interest in the land under the terms and conditions of the JVA. Thereafter, the defendant shall, "subject to settlement of the owner's entitlement hereunder, be absolutely entitled [to] the benefit of any arrangement made or the compensation awarded by such acquiring authority in respect of such acquisition in respect of the land."

[63] Section 8.02 of the JVA is reproduced below:

> Section 8.02: Effect of acquisition
>
> In the event of notification or declaration pursuant to Section 4 or 8 respectively of the land Acquisition Act 1960 or any re-enactment or re-certification thereof of the likely or intended acquisition of the whole or part of the land by the Government or such other competent authority for any purpose whatsoever being published prior to the completion of the project in accordance with the terms and conditions herein, the Owner shall immediately give notice in writing to the Company of such notification or declaration and the Company shall forthwith be entitled by notice in writing to the Owner elect EITHER:
>
> (a) To rescind this Agreement whereupon the Company shall, within fourteen (14) days from the date of the Company's notice withdraw or cause to be withdrawn all caveats lodged on the land for or on behalf of the Company and redeliver to the Owner all related

A Owner's documents intact and if the same shall then have been delivered to the Company, vacant possession of the land and thereafter this Agreement shall be terminated and shall be null and void and of no effect or force and neither party hereto shall have any further rights against the other save and except for any mutually agreed terms by the parties hereto; OR

B

(b) To require the Owner to serve notice upon such acquiring authority with fourteen (14) days from the date of receipt of the Company's election of the Company's interest in the land under the terms and conditions of this Agreement and thereafter the Company shall, subject to settlement of the Owner's entitlement hereunder, be
C absolutely entitled the benefit of any arrangement made or the compensation awarded by such acquiring authority in respect of such acquisition in respect of the land.

[64] As regards acquisition of the scheduled land, Winston Ng Tiat Seng ("DW1") of the defendant in a WhatsApp message on 4 July 2017 (in bundle
D B1/p. 197) informed Keane Goh Yan Han ("PW2") that the construction of the MEX 2 Highway had encroached on part of the land.

[65] PW1 of the plaintiff then wrote a letter dated 20 July 2017 (in bundle B1/200) to the CEO of Maju Expressway Sdn Bhd, the concessionaire of the MEX 2 Highway, asking them to stop all works that are encroaching on to
E the land. In a letter dated 11 August 2017, Maju Expressway Sdn Bhd, replied to the plaintiff and informed them that the land was involved in the construction of the MEX 2 Highway and that their surveyor is preparing the land acquisition plan (pelan pengambilan tanah) for submission to the Lembaga Lebuhraya Malaysia ("LLM").

F **[66]** The acquisition notice under s. 8 of the LAA 1960 was gazetted on 12 April 2018 and the Borang E notice of inquiry was issued on 18 May 2018 to both the plaintiff as the registered owner of the land and to the defendant as a caveator of the land.

G **[67]** It is settled law only "persons interested" in the compensation are entitled to the compensation for land compulsory acquired under the LAA 1960. Who are "persons interested' under the LAA 1960? s. 2 of the LAA 1960 defines "person interested" as follows:

"person interested" includes every person claiming an interest in
H compensation to be made on account of the acquisition of land under this Act, but does not include a tenant at will.

[68] The Federal Court in *Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd* [2017] 8 CLJ 392; [2017] 6 AMR 114; [2017] AMEJ 0996, held that:

I

[37] Before a person is entitled to claim compensation on account of a compulsory acquisition of land, he must be a "person interested" within the meaning of the Act [Land Acquisition Act 1960].

...

[69] Zulkefli Ahmad Makinudin PCA delivering the judgment of the Federal Court cited with approval the different categories of "person interested" listed by the Court of Appeal in *Sistem Penyuraian Trafik KL Barat Sdn Bhd v. Kenny Heights Development Sdn Bhd & Anor* [2009] 4 CLJ 57; [2009] 3 MLJ 809; [2009] 3 AMR 97, where he said:

[39] In the case of *Sistem Penyuraian Trafik KL Barat Sdn Bhd v. Kenny Heights Development Sdn Bhd & Anor* [2009] 4 CLJ 57; [2009] 3 MLJ 809, the Court of Appeal in itemising the different categories of "person interested" under the Act [Land Acquisition Act 1960] have included the following persons:

(a) A person who has entered into a contract to purchase a piece of land, *ie*, a beneficial owner, following the case of *JC Galstaun, Obiector v. Secretary of State for India In Council & Ors* [1905-1906] 10 CWN 195.

(b) An option holder, following the case of *Oppenheimer v. Minister of Transport* [1941] 3 All ER 485. In the case of *Oppenheimer v. Minister of Transport*, the claimant had obtained an option to purchase land which was subsequently the subject of a compulsory acquisition under the Lands Clauses Consolidation 1845. The English High Court held that the option gave the claimant an interest in the land in respect of which he would be entitled to compensation if the land was compulsorily acquired.

(c) A person having an equitable interest in the acquired property under trust, following the case of *KS Banerjee v. Jatindra Nath Paul and Other* AIR 1928 Calcutta 475.

[40] *The question that has to be posed here is whether a "person interested" is required to establish an interest in land as we understand the term to be in the context of the NLC to be entitled to compensation*. Reference to the Indian case authorities are relevant in this regard, as our Act is substantively similar to the Indian Land Acquisition Act 1894. From a perusal of the Indian case authorities which have been subsequently adopted by our Malaysian courts, *it is clear that the law on land acquisition does not necessitate a "person interested" to establish an interest in land to be entitled to compensation. It would suffice for the "person interested" to establish an interest in the compensation on account of the compulsory acquisition of the land, to be entitled to compensation*.

(emphasis added)

[70] Accordingly, in this instant case, for the defendant to establish itself as a "person interested" in the compensation sum under the LAA 1960, it is sufficient for it to prove that it is entitled to the compensation on account of the compulsory acquisition of the scheduled land.

[71] Based on the Court of Appeal's decision in *Sistem Penyuraian Trafik KL Barat Sdn Bhd v. Kenny Heights Development Sdn Bhd & Anor* (*supra*), "person interested" in the compensation awarded for compulsory acquisition of land, include:

(i) a beneficial owner of land, *ie*, a person who had entered into a contract to purchase the land;

(ii) an option holder of land, *ie*, a person who had obtained an option to purchase the land;

(iii) a person having an equitable interest in the land acquired under trust.

[72] The defendant did not purchase the land from the plaintiff nor did it have an option to purchase the land. It also did not have an equitable interest in the land acquired under trust.

[73] Instead, the defendant is relying on a contractual right based on the provision in s. 8.02(b) of the JVA to make its case that it is absolutely entitled to the Compensation sum awarded by the Land Administrator for acquisition of the scheduled land.

[74] Under s. 8.02 of the JVA upon notification of the compulsory acquisition, the defendant must elect to either rescind the JVA under s. 8.02(a) or (b) which require the plaintiff to serve on the acquiring authority notice of the defendant's interest in land. Section 8.02(b) of the JVA expressly states that the defendant shall be absolutely entitled to the compensation sum "subject to the settlement of the owner's entitlement".

[75] The defendant was notified by the authorities of the compulsory acquisition in the Borang E notice of inquiry. It is not disputed that the defendant's representative attended the inquiry before the Land Administrator and that it was awarded costs by the Land Administrator for the application of the planning permission in the sum of RM300,000.

[76] There is, however, no evidence before this court that the defendant had given the plaintiff notice in writing of its election under para. (a) or (b) of s. 8.02 of the JVA, *ie*, either to rescind the JVA or to require the plaintiff to notify the acquiring authority of the defendant's interest in the land.

[77] What is the "owner's entitlement" mentioned in s. 8.02(b) of the JVA? "owner's entitlement" is the plaintiff's total entitlement of the project as agreed in the JVA, which is RM220 million or 22 per cent (%) of the total gross development value ("GDV") of all seven phases of the project, whichever is higher. Paragraph 2 of the Second Schedule of the JVA states:

"2. **Owner's Entitlement**

2.1 The Company shall pay the Owner such entitlements within such periods of time as set out in the Table below: -

(1) Periods	(2) Owner's Entitlements
Within the **1st and 2nd years** of the 1st BP Approval Date **[First (1st) Phase]**	**RM10,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the First (1st) Phase, whichever is higher
Within the **3rd and 4th years** of the 1st BP Approval Date **[Second (2nd) Phase]**	**RM20,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Second (2nd) Phase, whichever is higher
Within the **5th and 6th years** of the 1st BP Approval Date **[Third (3rd) & Fourth (4th) Phases]**	**RM35,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Third (3rd) & Fourth (4th) Phases, whichever is higher
Within the **7th and 8th years** of the 1st BP Approval Date **[Fifth (5th) & Sixth (6th) Phases]**	**RM65,000,000.00** only or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Fifth (5th) & Sixth (6th) Phases, whichever is higher
Within the **9th and 10th years** of the 1st BP Approval Date **[Seventh (7th) Phase]**	**RM90,000,000.00 only** or an amount equals **twenty-two per centum (22%)** of the GDV attributable to the Seventh (7th) Phase, whichever is higher

[78] GDV is defined as "in relation to a phase of the project, the aggregate selling prices of all the lots erected in that phase for the time being determined by the (defendant) at its sole discretion."

[79] Pursuant to para. 2.3 of the Second Schedule of the JVA, the defendant may settle the owner's entitlement either in cash or by allocating to the plaintiff such number of lots (or units in the relevant phase or phases equal in value to the entitlement), or a combination of cash or allocation of lots.

[80] Learned counsel for the defendant submits that the non-payment of the owner's entitlement by the defendant to the plaintiff should not be "a ground to defeat the defendant's entitlement to the compensation sum" as the payment of the owner's entitlement is not yet due for payment.

[81] Section 8.02(b) expressly states that the defendant is absolutely entitled to the compensation sum "subject to the settlement of the owner's entitlement." It makes no mention nor does it impose a condition that that the defendant is absolutely entitled to the compensation sum subject to the settlement of the owner's entitlement "when it is due for payment".

[82] If the defendant's position was that the defendant's entitlement to the compensation sum for the compulsory acquisition of the land is subject to the settlement of owner's entitlement "when it is due for payment" it should have requested for such a term to be included in s. 8.02(b) of the JVA or refused to enter into the JVA in the absence of the term.

[83] It is not disputed that the defendant had prepared the JVA – PW1's testimony on this fact was not challenged by the defendant during cross-examination.

[84] It is trite where there is any ambiguity in the interpretation of the agreement, the *contra proferentum* rule applies. Under the *contra proferentum* rule, any ambiguity is resolved against the party who had prepared the agreement. In *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7; [1983] 2 MLJ 85, an appeal from the Federal Court to Privy Council, Lord Brightman held:

> Furthermore, there is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution. *Neill v. Duke of Devonshire* [1882] 8 App Cas 135, 149, *Norton on Deeds* 2nd edn., p. 127.

[85] The Federal Court in the case of *Union Workshop (Construction) Co v. Ng Chew Ho Construction Co Sdn Bhd* [1977] 1 LNS 149; [1978] 2 MLJ 22 held:

> Whereas here, the meaning is perfectly clear, there can be no resort to other documents to give another meaning to it. And where the draftsman had purposely left out any condition which he could without difficulty have put in, then the *contra-proferentum* rule applies to arrive at the inevitable conclusion that the clause did not form part of the agreement between them, and that the payment was to include the weight of steel other than the girders.

[86] In the case of *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440; [2019] 7 AMR 385, the Federal Court held:

[98] Coming to the *contra proferentum* rule, it provides that where a term is ambiguous, such ambiguity ought to be construed against the party who prepared it.

Findings Of Court

[87] This court finds that from the plain and ordinary reading of the terms and conditions in the JVA and in s. 8.02(b) of the JVA, it is clear that the defendant is only absolutely entitled to the Compensation sum upon settlement to the plaintiff of the owner's entitlement under the JVA. This court finds that the provision as drafted is clear in its meaning. Nevertheless, if there was any ambiguity in the provision, under the *contra proferentum* rule, such ambiguity must be construed adversely against the defendant as the party who had the prepared the JVA.

[88] It is not disputed that the defendant has not settled any of the owner's entitlement to the plaintiff.

[89] Therefore, as the defendant has not settled any of the owner's entitlement to the plaintiff, this court finds that the defendant is not contractually entitled to the Compensation sum pursuant to the terms in s. 8.02(b) of the JVA.

[90] Learned counsel for the defendant had submitted in the alternative that if the owner's entitlement had become due and the defendant had not paid the plaintiff, the JVA does not contain any provision in such a situation that the compensation sum be paid to the plaintiff instead. He had also argued that if the plaintiff takes the position that the conditions precedent in the JVA has not been fulfilled and the JVA is null and void, the plaintiff cannot then attempt to enforce cl. 8.02 of the JVA against the defendant. I find both these arguments by learned counsel for the defendant rather puzzling.

[91] First, the defendant had made its claim that it is a "person interested" in the compensation premised on s. 8.02(b) of the JVA. If the JVA is null and void, it follows that there is no valid s. 8.02(b) of the JVA under which the defendant can make its claim for the Compensation sum.

[92] Secondly, in respect of compensation awarded for land acquired under the LAA 1960, the Federal Court in *Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd* (*supra*) had reduced the threshold of proof for a person who is not the registered owner of land acquired under the LAA 1960 but claims to be interested in the compensation awarded. The court held that a person who is not a registered owner of the land may be a "person interested" to the compensation awarded if it could show the court that it is a person interested in the compensation under the LAA 1960. Zulkefli Ahmad Makinudin PCA held that if that person can show that it is interested in the compensation awarded for the acquired land under the LAA 1960, it is not necessary for that person to show that it is a "person interested" in the land under the National Land Code. It follows, therefore, that if the person who claims to be interested to the compensation is unable to prove that it

A is a "person interested" in the compensation under the LAA 1960, the registered owner of the land as a person interested in the acquired land under the National Land Code is the person interested in the compensation awarded for the land under the LAA 1960.

B **[93]** As discussed above, the defendant is not able to prove that it is the person interested to the compensation sum awarded for the Scheduled Land. Therefore, the plaintiff as the registered owner of the land as at the date of the award by the Land Administrator is the person entitled to the compensation sum awarded for the scheduled land.

C *Is The JVA Terminated And/Or Has Become Null And Void?*

[94] For the reasons discussed above, this court has found that the defendant had failed to apply for the development order within the period of six months from the date of the JVA.

D **[95]** Section 4.04(a) of the JVA states that if, due to no fault of either the plaintiff or the defendant, any or more of conditions precedent stipulated in s. 4.01 has not been fulfilled within two years from the date of submission of the application for the development order in respect of the project or the six months extension of time which the plaintiff agrees to grant to the defendant upon request. It is not disputed that the defendant did not ask for

E an extension of time.

[96] Based on the documentary evidence and the testimonies of PW3 and DW4, the date of submission of the application for the development order was 17 October 2018. One or more of the conditions precedents set out in s. 4.01 of the JVA have not been fulfilled within the two-year period, *ie*, by

F 16 October 2020. There is no evidence produced in court that the conditions precedents were not fulfilled within the required time period was the fault of either party.

[97] For this reason, this court finds that the JVA is terminated and is null

G and void pursuant to s. 4.04 of the JVA.

[98] The defendant's failure to submit the application within six months of the date of the JVA is a breach of the defendant's warranty and undertaking to the plaintiff in s. 4.02(a) of the JVA. Pursuant to para. 1.3 of the Second Schedule of the JVA, the plaintiff is entitled to forfeit RM3 million from the

H first payment as agreed liquidated damages for the breach.

[99] Therefore, the plaintiff has to return only RM2 million out of the RM5 million that it had received from the defendant as the first payment of the initial payment.

I **[100]** Pursuant to s. 4.04 of the JVA, the defendant must withdraw or cause to withdraw the private caveat that it had lodged on the land. As the JVA is terminated and null and void, the defendant does not have any basis to maintain its private caveat on the land

The Defendant's Counterclaim

[101] In its counterclaim against the plaintiff, the defendant seeks for a declaration that it is entitled to the Compensation sum and that the JVA remains subsisting, valid and enforceable between the parties.

[102] For the reasons discussed above, this court had found that the defendant is not entitled to the Compensation sum and that the JVA is terminated and is null and void.

Is The Defendant Entitled To Any Reimbursement Or Any Compensation For The Costs That The Defendant Had Spent On The Land? Does The Plaintiff Have To Pay The Defendant A Sum Which Is Equivalent To The Increase In The Value Of The Land?

[103] The defendant had pleaded in its counterclaim that in the event this court holds that the JVA is terminated and/or is null and void, the defendant seeks the following reliefs in the alternative:

(i) that the plaintiff compensates the defendant for costs incurred and losses suffered by the defendant; and

(ii) that the plaintiff pays the defendant a sum equivalent to the increase in the value of the land.

[104] As discussed above, the fiscal terms of the joint venture for the development of the project on the land as agreed between the parties under the JVA is that the plaintiff grants the defendant the exclusive right to develop the project on the land and the defendant carries out and completes the development of the project in seven phases (first to seventh phase) at its own costs and expense. The defendant is to pay the plaintiff the initial sum of RM10 million consisting of the first and second payments of RM5 million each. The plaintiff is to return the RM10 million, after the issuance of the final completion certificate for the seventh phase, less the agreed liquidated damages of RM3 million in the event the defendant failed to submit the application for the development order within six months of the date of the JVA.

[105] The plaintiff's total entitlement of the project under was RM220 million or 22 per cent (%) of the total GDV of all seven phases of the project, whichever is higher. Hence, the defendant's entitlement of the project is RM780 million or 78% of the GDV of all seven phases of the project.

[106] Moreover, pursuant to s. 5.01 of the JVA, the defendant had warranted, covenanted and undertook with the plaintiff as follows:

> (a) the Company shall, at the *Company's entire own cost and expense*, prepare, draw up and submit in such manner as the Company shall at its sole discretion deem fit and proper the necessary applications and related documents whatsoever for obtaining the Approvals necessary for the overall development of the land and the carrying out and successful completion of the project thereon;

(b) the Company *shall bear and promptly pay all premia, fees, costs, levies, expenses, contributions, deposits and payments whatsoever imposed by the Appropriate Authorities or otherwise in connection with the applications for the Approvals*;

(c) the Company shall, upon obtaining the Approvals, commence the Construction and Development Works and shall at all times expeditiously and diligently execute, carry out and undertake the Construction and Development Works in accordance with the Approved Plans;

(d) the Company *shall, at its entire own cost and expense, appoint, engage and employ* the Architect, the Consultants, the Main Contractor, the sub-contractors, the suppliers, and any others and all workers, staff and employees necessary for the Construction and Development Works and the carrying out of the successful completion of the project and shall promptly pay all fees, salaries, wages and other payments whatsoever therefor as and when such fees, salaries, wages and other payments become due and payable;

(e) the Company *shall bear and pay all costs, expenses, deposits, contributions and payments whatsoever necessary to carry out and complete the project and all costs, expenses and payments whatsoever incidental to and in connection therewith*, including but without limiting the generality of the foregoing, for the supply and commissioning of the Facilities, Infrastructure and Amenities including but not limited to all equipment and materials required by the fire, water, electricity, telecommunication, local and other Appropriate Authorities;

(f) without limiting the foregoing, the Company *shall, at its entire own cost and expense, prepare all applications, forms and plans, whatsoever documents and documents and do all things whatsoever to obtain and procure all licences, consent, approvals and or permits necessary for the development of the land*, including but not limited to the Approvals and for the issuance of separate documents of title and or strata titles for the project and the Company shall bear and pay all premia, fees, costs, levies, expenses, contributions, deposits and payments whatsoever required and or imposed by the Appropriate Authorities therefor;

(g) the Company shall represent the Owner and act as its agent in communicating, liaising, coordinating and monitoring with all Appropriate Authorities, Consultants and Contractors in all matters pertaining to the project, including but not limited to the preparation, drawing up and submission of all necessary applications, documents and forms whatsoever for the requisite licences, permits, consents and approvals for the carrying out and completion of the project;

(h) the Company shall, *at its entire own cost and expense, cause to be constructed the Facilities, Infrastructure and Amenities* including but not limited to access and or service roads (including for ingress and access to and from the land) and drains, the electrical and water mains and pipes sewerage and water systems and such others as may be required by the Appropriate Authorities to serve the project;

(i) the Company shall comply with all Acts, Ordinances, enactments, bye-laws, rules and regulations affecting and or binding upon the land and the project and with all covenants and obligations whatsoever on the part of the Company to be observed and performed;

(j) the Company shall call for, decide and award tenders for works to be carried out under the project and to proceed to appoint, engage and or comply, and issue instructions to the successful tenderers;

(k) the Company shall liaise with, coordinate and monitor the works and responsibilities to be carried out by the Consultants under the project;

(l) the Company shall supervise and oversee the works and progress of the Contractors through the Consultant and or Architect to ensure compliance with their responsibilities and schedule of works stipulated in their respective contracts, and with plans and specifications approved by the Appropriate Authorities;

(m) the Company shall organize, coordinate and decide on the entire marketing, sales promotion and publicity including but not limited to formulating marketing concepts, liaising with media and advertising agencies and or public relation consultants on the preparation and printing of brochures, pamphlets, advertisement placements, signboards, and any other matters or things related thereto and to decide the sales prices of the Lots comprised in the project, all such sales prices of all Lots comprised in the project shall be the sole prerogative of the Company;

(n) the Company shall decide and appoint the advertising and public relations agencies required for the project and to negotiate the fees payable to them and the mode and manner for such payments and shall promptly pay for all such fees;

(o) the Company shall decide and appoint solicitors to prepare and complete the legal documentation in respect of the sales and transfers of the Lots comprised in the project;

(p) the Company shall provide sales administration and management services including to communicate and liaise with the end-purchasers, solicitors, end-financier, statutory bodies and governmental or other authorities or any other parties on all matters in connection with the project including to issue letters, notices and requests for progress payments, to deal with all enquiries, complaints and correspondence;

(q) the Company shall not do or permit to be done any act or thing or suffer or cause to be suffered any omission which may contravene or violate the provisions of any written law, regulation, decree, order, rule or directive (for the time being having the force of law) of any governmental or semi-or *quasi*-governmental authority, agency or department or any Appropriate Authorities for the time being applicable to the construction and development of the project which may cause or result in any delay in the implementation or progress and or completion of the project or render the Owner liable to any claims, demands, suits, proceedings, prosecution, fines, damages, losses, costs or expenses;

A (r) the Company shall apply for and obtain the separate documents of title and/or strata titles to the Lots. It is hereby expressly agreed that the Company shall not be liable for any losses, damages, costs or expenses howsoever arising or incurred due to the delay in the issuance or in the non-issuance of the separate individual documents of title and/or strata titles;

B (s) the Company shall in due course *at its own cost and expense procure and obtain for the Lots such Certificates of Completion and Compliance or other certificates of fitness for occupation* as shall required under the Street, Drainage and Building Act 1974 or any other written laws for the time being in force;

C (t) the Company *shall at its own costs obtain insurance for the protection of workers at the work site of the land and shall indemnify the Owner from all liabilities* it shall incur as a result of any incident/accident occurring to the workers at the worksite of the land;

(u) the Company shall keep the Owner informed from time to time, and as and when reasonably requested by the Owner, of the progress of the
D implementation, development and or other works under the project; and

(v) the Company shall not charge, mortgage or otherwise encumber howsoever the land or any part thereof or any interest therein or purport to do any of such acts or things.

(emphasis added)

E **[107]** It is clear from the provisions in s. 5.01 of the JVA that the defendant had warranted, covenanted and undertook that it will carry out all the works necessary for the development and construction of the project at its own costs and expenses.

F **[108]** Furthermore, the final sentence in s. 4.04 of the JVA states:

> The parties hereto hereby expressly agree that in such event, or in any other event whatsoever, the Company shall not be entitled to any reimbursement or compensation whatsoever for any premia, fees, cost, levies, expenses and or payments whatsoever paid, incurred and or
G suffered by the Company in connection with this Agreement, the project and or the Approvals.

[109] "In such event in the first part of the sentence in s. 4.04 refers to the termination of the JVA and it being null and void in the event that one or more of the conditions precedents are not fulfilled within two years from the
H date of the submission of the application of the development order.

[110] Whereas the phrase "in any other event whatsoever" means just that. The parties had expressly agreed that the defendant shall not be entitled, in any event whatsoever, to "any reimbursement or compensation whatsoever for any premia, fees, cost, levies, expenses and or payments whatsoever paid,
I incurred and or suffered by the company in connection with this agreement, the project and or the approvals".

[111] It is clear from s. 4.04 of the JVA that the parties had agreed that the defendant in any event whatsoever shall not be entitled to any reimbursement or compensation whatsoever for any costs and expenses that the defendant had paid, incurred or suffered in connection with the JVA, the project and the approvals applied for.

[112] I find that the words in s. 4.04 are very clear in its meaning. But if there is any ambiguity in the wordings in s. 4.04, pursuant to the *contra proferentum* rule, the said wordings are to be interpreted against the defendant as the party that had drafted the JVA.

[113] For these reasons, this court finds that the defendant is not entitled to any compensation or reimbursements for the costs that it had incurred and losses that it had suffered. Also, that it is not entitled to payment from the plaintiff a sum equivalent to the increase in the value of the land.

Decision

[114] For the above reasons, it is hereby ordered:

(i) a declaration that the joint venture agreement dated 18 August 2015 between the plaintiff and the defendant is terminated and is null and void;

(ii) a declaration that the plaintiff is entitled to the whole of the compensation sum of RM9,397,400 awarded by the Land Administrator for the acquisition of 0.9892 hectare of land held under No. Hakmilik HSD 13828, Lot No. PT26800 (No. Lot Baru: 30729), Mukim Dengkil, Daerah Sepang, Selangor;

(iii) a declaration that the plaintiff is entitled to forfeit the sum of Ringgit Malaysia Three Million (RM3,000,000) from the initial payment paid by the defendant as agreed liquidated damages based on the terms of the joint venture agreement;

(iv) the plaintiff is permitted to demand for the whole of the compensation sum of RM9,397,400 deposited in this court, together with all accrued interest under Originating Summons BA-24NCVC-1363-11-2018;

(v) the plaintiff refunds to the defendant the sum of Ringgit Malaysia Two Million (RM2,000,000) from the initial payment paid by the defendant;

(vi) the private caveat Perserahan No. 54272/2015 which was entered by the defendant on 22 October 2015 on the land held under No. Hakmilik HSD 13828, Lot No. PT26800 (No. Lot Baru: 30729), Mukim Dengkil, Daerah Sepang, Selangor be cancelled or removed forthwith;

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(vii) the Registrar of Titles and all relevant authorities is ordered s. 417 of the National Land Code to give effect to this order;

(viii) the defendant's counterclaims are dismissed; and

(ix) the defendant pays the plaintiff for this suit in the sum of RM30,000.

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